No. 92-1297

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM H. MELCHER, ACTING DIRECTOR OF REVENUE OF MISSOURI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON
Acting Solicitor General

MICHAEL L. PAUP
Acting Assistant Attorney General

DAVID ENGLISH CARMACK
JOHN J. MCCARTHY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the United States has standing to maintain the federal cause of action for money had and received to recover federal funds paid by a federal contractor under an unlawful state tax assessment.

2. Whether, in a suit brought by the United States, the federal courts should abstain from deciding the validity of a state tax assessment under state law.

3. Whether the Anti-Injunction Act, 28 U.S.C. 1341, denies jurisdiction to the district court to grant injunctive relief to the United States from enforcement of an invalid state tax.

4. Whether the property purchased by the federal contractor for the United States was subject to the state sales and use tax.

5. Whether the United States, without complying with state tax refund procedures or state statutes of limitations, may proceed in federal court under the federal common law action for money had and received to recover state sales and use taxes unlawfully collected from a federal contractor.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Allegheny County v. *Frank Mashuda Co.*, 360 U.S. 185 (1959)	8
Canteen Corp. v. *Goldberg*, 592 S.W.2d 754 (Mo. 1980)	7, 9
City of New Orleans v. *United States*, 371 F.2d 21 (5th Cir.), cert. denied, 387 U.S. 944 (1967)	8
City of Springfield v. *United States*, 99 F.2d 860 (1st Cir. 1933), cert. denied, 306 U.S. 650 (1939)	9
Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943)	7
Colorado River Water Conservation District v. *United States*, 424 U.S. 800 (1976)	7
Department of Employment v. *United States*, 385 U.S. 355 (1966)	8
Franchise Tax Board of California v. *Alcan Aluminum Ltd.*, 493 U.S. 331 (1990)	9
Jefferson County v. *United States*, 450 U.S. 901 (1981)	6
Lujan v. *Defenders of Wildlife*, 112 S. Ct. 2130 (1992)	6
Maryland v. *Louisiana*, 451 U.S. 725 (1981)	6
New Orleans Public Service, Inc. v. *Council of New Orleans*, 491 U.S. 350 (1989)	8
Odorite of America, Inc. v. *Director of Revenue*, 713 S.W.2d 833 (Mo. 1986)	10

Cases—Continued: Page

Overland Steel, Inc. v. *Director of Revenue*, 647 S.W.2d 535 (Mo. 1983) 10
Richards v. *United States*, 369 U.S. 1 (1962) 10
Simon v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976) 6
State ex rel. Thompson-Stearns-Roger v. *Schaffner*, 489 S.W.2d 207 (Mo. 1973) 10
United States v. *Anderson County*, 705 F.2d 184 (6th Cir.), cert. denied, 464 U.S. 1017 (1983) 8-9
United States v. *Arlington County*, 326 F.2d 929 (4th Cir. 1964) 9
United States v. *Broward County*, 901 F.2d 1005 (11th Cir. 1990) 8, 9
United States v. *Bureau of Revenue of New Mexico*, 291 F.2d 677 (10th Cir. 1961) 6, 9
United States v. *City of New York*, 175 F.2d 75 (2d Cir.), cert. denied, 338 U.S. 885 (1949) 8
United States v. *Colorado*, 627 F.2d 217 (10th Cir. 1980), aff'd *sub nom. Jefferson County* v. *United States*, 456 U.S. 901 (1981) 6
United States v. *Forst*:
569 F.2d 811 (4th Cir. 1978) 11
442 F. Supp. 920 (W.D. Va. 1977), aff'd, 569 F.2d 811 (4th Cir. 1978) 11
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979) 7
United States v. *Livingston*, 179 F. Supp. 9 (E.D.S.C. 1959), aff'd, 364 U.S. 281 (1960) 9
United States v. *Michigan*, 851 F.2d 803 (6th Cir. 1988) 8
United States v. *Montgomery County*, 761 F.2d 998 (4th Cir. 1985) 9
United States v. *Nevada Tax Commission*, 439 F.2d 435 (9th Cir. 1971) 6

Cases—Continued: Page

United States v. *Woodworth*, 170 F.2d 1019 (2d Cir. 1948) 9

Valley Forge Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 6

Statutes and regulation:

Anti-Injunction Act, 28 U.S.C. 1341 ..... 3, 4, 8, 9-10

28 U.S.C. 1345 8

Mo. Rev. Stat. (1986):

§ 144.010.1(8) 9, 10, 11

§ 144.020.1 5

48 C.F.R. 31.205-41(a)(2) 6

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1297

WILLIAM H. MELCHER, ACTING DIRECTOR OF REVENUE OF MISSOURI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A15) is reported at 975 F.2d 511. The opinions of the district court (Pet. App. A19-A36 and A37-A48) are reported at 772 F. Supp. 453 and 729 F. Supp. 671.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1992. A petition for rehearing was denied on November 6, 1992 (Pet. App. A1). The petition for a writ of certiorari was filed on February 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 3, 1985, the United States contracted with Olin Corporation to manage, operate and maintain the federally owned Lake City Ammunition Plant. The Plant manufactures ammunition for the United States Army (Pet. App. A3, A20-A21). Under the federal management contract, the United States pays Olin a management fee and reimburses Olin for the cost of materials acquired for operation of the Plant (*id.* at A3, A7, A20-A21). The contract provides that title to materials purchased by Olin passes directly from vendors to the United States upon delivery at the Plant (*id.* at A3, A21).[1] Olin was free to select the vendors from whom materials were purchased but was required to report to the United States on its operations. Most tasks were subject to the direction or approval of the Army's contracting officer (*id.* at A21).

From November 1985 until April 1988, Olin paid Missouri sales and use taxes assessed on materials purchased for use at the Plant. Pursuant to the federal contract, the United States reimbursed Olin for the cost of these purchases and the taxes paid on them (Pet. App. A3, A20).

2. The United States brought suit in district court seeking (i) a declaration that, under Missouri law, the purchases Olin made under its contract with the United States were not subject to the State's sales and use taxes, (ii) an injunction restraining petitioners from attempting to collect such taxes and (iii) a refund of the sales and use taxes that had been paid by Olin and reimbursed by the United States (Pet. App. A19-A20).

---

[1] The purchase orders placed by Olin similarly provided for passage of title directly to the United States (Pet. App. A3, A21).

The district court rejected petitioners' claim that the United States lacks standing to bring this action. The court noted that, under the federal management contract, the United States was contractually obligated to reimburse Olin for the taxes it paid. Erroneous state tax assessments thus cause a direct pecuniary injury to the United States and give it standing to challenge the state tax (Pet. App. A40-A41). The district court also rejected petitioners' contentions (i) that 28 U.S.C. 1341 bars the injunctive relief sought by the United States (Pet. App. A41-A47) and (ii) that the federal courts should abstain from deciding questions concerning state tax law in a suit brought by the United States (*id.* at A47). The court held that the federal common law cause of action for money had and received authorizes recovery of unlawful state tax assessments and that the federal claim is not subject to state-law administrative tax refund requirements or the state statute of limitations (*id.* at A21-A24).

Reaching the merits of the state tax, the district court granted summary judgment to the United States. The court held that Olin's purchases of materials for use in Plant operations are purchases for resale to the United States under the federal contract and are therefore not taxable under state law (Pet. App. A24-A36). The court enjoined petitioners from "imposing or collecting Missouri sales or use taxes on purchases of tangible personal property made by Olin Corporation under the terms of its contract with the United States Department of the Army for the operation of the Lake City Army Ammunition Plant" (*id.* at A17). The court further ordered petitioners to refund $683,630 in sales and use taxes that Olin had paid and for which it had been re-

imbursed by the United States, together with prejudgment interest (*id.* at A17-A18).

3. The court of appeals affirmed the district court in all respects other than the award of prejudgment interest, which it reversed (Pet. App. A2-A15).[2] With respect to petitioners' argument that the Anti-Injunction Act, 28 U.S.C. 1341, bars injunctive relief in an action brought by the United States, the court of appeals stated (Pet. App. A4):

> At the heart of this dispute lies the contractual relationship between the United States and Olin. To determine whether the transfers between the original vendors and Olin, and the subsequent transfers by Olin to the United States amounted to a "sale for resale" under Mo. Rev. Stat. § 144.010.1(8) (1986), the contract between Olin and the government must be examined. The interpretation of a contract between the United States and another party depends on federal law. * * * In such a situation, the Tax Injunction Act does not bar the United States from seeking a resolution of this federal question in a federal forum.

The court of appeals also rejected petitioners' standing and abstention arguments, noting that the United States is the party suffering monetary harm from unlawful imposition of the challenged state tax. The court pointed out that petitioners' suggestion that Olin—rather than

---

[2] The United States filed a petition for a writ of certiorari (No. 92-1296) with respect to the court of appeals' ruling on the prejudgment interest issue. We suggested that the question presented in that petition should be disposed of in light of the Court's resolution of *United States* v. *Texas*, No. 91-1729 (argued Mar. 1, 1993).

the United States—should bring this suit would require an unnecessary "circuity of action" (*id.* at A5).

The court next rejected petitioners' argument that the federal common law cause of action for money had and received is subject to state administrative tax refund procedures and state statutes of limitations (Pet. App. A5 n.1). Noting that this issue is before this Court in *United States* v. *California*, No. 91-2003 (argued Feb. 23, 1993), the court stated that it found "more persuasive the reasoning of *United States* v. *Broward County, Florida*, 901 F.2d 1005 (11th Cir. 1990), which allowed the United States to proceed" in a similar case (Pet. App. A5 n.1).

On the merits, the court of appeals held that the purchases made by Olin under the federal contract were not sales "at retail" (Mo. Rev. Stat. § 144.020.1 (1986)) under Missouri law. Instead, they were nontaxable sales for resale to the United States (Pet. App. A5-A8).

The dissenting judge agreed that Olin's purchases were not subject to the Missouri sales and use taxes (Pet. App. A13 n.2). He concluded, however, that the United States lacks standing to challenge the state tax because, in his view, the government is not obligated to reimburse sales and use taxes that its contractor did not owe (*id.* at A10-A14).

ARGUMENT

The court of appeals correctly resolved the questions presented in the petition. But see note 2, *supra*. There are no grounds warranting further review of the first four questions. The fifth question is similar to the question to be addressed by this Court in *United States* v. *California*, No. 91-2003 (argued Feb. 23, 1993), and should be disposed of as appropriate in light of the Court's resolution of that case.

1. The court of appeals correctly held (Pet. App. A5) that the United States has standing to challenge the state tax. The United States has an obvious and meaningful financial stake in application of the state tax to purchases of property in the name of the United States for use at the federally owned ammunition plant in Missouri. Under the standard terms of the federal management contract, the federal contractor is entitled to reimbursement for state taxes that it must pay or that it pays under "a claim of illegality or erroneous assessment" (48 C.F.R. 31.205-41(a)(2)). Since the economic burden of the state tax falls upon the United States, the United States (as the real party in interest) suffers a distinct and palpable injury fairly traceable to petitioners' challenged conduct—and therefore has standing to challenge the tax. See *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472-473 (1982); *Maryland* v. *Louisiana*, 451 U.S. 725, 736 (1981); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

The courts of appeals have consistently agreed that the United States has standing to sue state and local governments to recover federally reimbursed tax payments made by federal contractors. See, *e.g.*, *United States* v. *Colorado*, 627 F.2d 217, 219 (10th Cir. 1980), aff'd *sub nom. Jefferson County* v. *United States*, 450 U.S. 901 (1981); *United States* v. *Nevada Tax Commission*, 439 F.2d 435 (9th Cir. 1971); *United States* v. *Bureau of Revenue of New Mexico*, 291 F.2d 677 (10th Cir. 1961). There is no conflict among the circuits or other ground warranting further review of this issue.

2. Petitioners err in contending (Pet. 13-17) that federal courts should abstain from deciding questions con-

cerning state tax law in a suit brought by the United States. In *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 813-818 (1976), the Court stated that abstention may be proper (i) when there is an unsettled issue of state law subject to a constitutional challenge that could be resolved in a manner that makes adjudication of the constitutional challenge unnecessary; (ii) when the federal court's jurisdiction is invoked to enjoin on constitutional grounds the continuation of state criminal or quasi-criminal judicial proceedings; and (iii) when there is a difficult and complex state law issue that pertains to state policy problems of such great import and interest to the State as to transcend the interest of the plaintiff. Petitioners argue that the present case comes within the third ground for abstention (Pet. 15).

As the lower courts recognized (Pet. App. A4-A8, A24-A31, A44), however, this action does not involve interpretation of an ambiguous state law that has not previously been interpreted. As the court of appeals correctly held (*id.* at A8, A13 n.2), the Supreme Court of Missouri, in an analogous factual context, has elaborated on the meaning of a "sale at retail" under Missouri tax law (*Canteen Corp.* v. *Goldberg*, 592 S.W.2d 754 (Mo. 1980) (en banc)). Direct application of the *Canteen Corp.* decision requires the conclusion that the purchases by the federal contractor in this case are not "sale[s] at retail" under Missouri law (Pet. App. A8). Moreover, as the lower courts recognized (*id.* at A4, A26, A44), the question whether the purchases by the federal contractor are "at retail" ultimately involves interpretation of the federal contract, which is a question of federal law to be determined by federal courts (*United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366 (1943)).

Abstention is particularly inappropriate in cases brought by the United States. Congress has conferred plenary jurisdiction on United States district courts over "all civil actions, suits or proceedings commenced by the United States" (28 U.S.C. 1345). The courts of the United States should not decline to exercise the plenary jurisdiction that Congress has expressly conferred over "all" claims of the United States. The court of appeals thus correctly declined to abstain in this case. See *United States* v. *Anderson County*, 705 F.2d 184 (6th Cir.), cert. denied, 464 U.S. 1017 (1983).[3]

---

[3] In support of the contention that abstention is appropriate in this case, petitioners cite *Allegheny County* v. *Frank Mashuda Co.*, 360 U.S. 185 (1959), *New Orleans Public Service, Inc.* v. *Council of New Orleans*, 491 U.S. 350 (1989), and *United States* v. *City of New York*, 175 F.2d 75 (2d Cir.), cert. denied, 338 U.S. 885 (1949). But *Allegheny County* and *New Orleans Public Service, Inc.* are not relevant because those cases did not involve the United States or the plenary jurisdiction of federal courts over the claims of the United States under 28 U.S.C. 1345. In *City of New York*, the court of appeals declined to consider a request by the United States for an injunction against a state tax because the validity of the tax turned solely on a state law question that "the state courts are peculiarly fitted to answer" and because the United States had a "wholly adequate remedy [at law] * * * in the state courts." 175 F.2d at 77. In the present case, however, the United States seeks damages under the federal common law cause of action for money had and received. Its action arises under federal law, and issues of state law form only an ingredient of the federal cause of action. See, *e.g.*, *United States* v. *Broward County*, 901 F.2d 1005, 1007-1008 (11th Cir. 1990); *United States* v. *Michigan*, 851 F.2d 803, 810 (6th Cir. 1988); *City of New Orleans* v. *United States*, 371 F.2d 21, 28 (5th Cir.), cert. denied, 387 U.S. 944 (1967). Moreover, unlike *City of New York*, issues of federal contract law are a necessary element of the government's claim in this case. In these circumstances, the courts have uniformly concluded that abstention is inappropriate. See, *e.g.*, *United States* v. *Anderson*

3. The Anti-Injunction Act, 28 U.S.C. 1341, does not preclude the injunctive relief that the United States requested in this case. While the Act generally denies jurisdiction to federal district courts to enjoin collection of state taxes, its provisions are not applicable to suits brought by the United States. *Department of Employment* v. *United States*, 385 U.S. 355, 357-358 (1966).

Petitioners err in contending (Pet. 18-24) that the Anti-Injunction Act bars injunctive claims of the United States that do not challenge the constitutionality of the state tax. The courts of appeals have consistently rejected that contention. They have concluded that the Act does not bar injunctive relief for the United States whether the challenge to the state tax is based upon the Constitution or upon state law. *United States* v. *Broward County*, 901 F.2d 1005, 1008 (11th Cir. 1990); *United States* v. *Anderson County*, 705 F.2d at 188; *United States* v. *Bureau of Revenue of New Mexico*, 291 F.2d at 679. See also *United States* v. *Arlington County*, 326 F.2d 929, 931 (4th Cir. 1964); *United States* v. *Woodworth*, 170 F.2d 1019, 1020 (2d Cir. 1948); *City of Springfield* v. *United States*, 99 F.2d 860, 862 (1st Cir. 1938), cert. denied, 306 U.S. 650 (1939).

Petitioners' contention (Pet. 18-20) that *United States* v. *Livingston*, 179 F. Supp. 9 (E.D.S.C. 1959), aff'd, 364 U.S. 281 (1960), *United States* v. *Montgomery County*, 761 F.2d 998 (4th Cir. 1985), and *Franchise Tax Board of California* v. *Alcan Aluminum Ltd.*, 493 U.S. 331 (1990), hold to the contrary is misplaced. *Franchise Tax Board of California* did not involve the United States. In *Livingston* and *Montgomery County*, the courts held that 28

County, 705 F.2d at 187-188; *United States* v. *Bureau of Revenue of New Mexico*, 291 F.2d at 679.

U.S.C. 1341 did *not* bar the injunctive relief sought by the United States in those cases. There is thus no conflict among the circuits on this issue to warrant further review.

4. Petitioners also seek review of the merits of the tax dispute (Pet. 20-24). The courts below (including the dissenting judge in the court of appeals) unanimously and correctly held (Pet. App. A5-A8, A13 n.2, A24-A31) that the purchases made by Olin were exempt from the Missouri sales and use tax as sales for resale under Mo. Rev. Stat. § 144.010.1(8) (1986). As they point out (Pet. App. A8, A13 n.2), under the terms of the federal contract, and under the reasoning of the Missouri Supreme Court in *Canteen Corp.* v. *Goldberg*, *supra*, the initial purchases by Olin were for resale to the United States. They were therefore exempt from the state tax under the plain language of the state statute (Mo. Rev. Stat. § 144.010.1(8) (1986)). Further review of this state law determination by the court of appeals is not warranted. See *Richards* v. *United States*, 369 U.S. 1, 16 n.35 (1962).[4]

---

[4] Petitioners' reliance (Pet. 21-22) on *Overland Steel, Inc.* v. *Director of Revenue*, 647 S.W.2d 535 (Mo. 1983) (en banc); *Odorite of America, Inc.* v. *Director of Revenue*, 713 S.W.2d 833 (Mo. 1986) (en banc); and *State ex rel. Thompson-Stearns-Roger* v. *Schaffner*, 489 S.W.2d 207 (Mo. 1973), is misplaced. *Overland Steel* involved the special rules concerning construction contractors who incorporate purchased materials into construction projects and are therefore said to "consume[] the materials," rather than resell them. See 647 S.W.2d at 537-538. The rules pertaining to construction contractors are not applicable to Olin, which purchases materials merely as manager of the ammunition plant owned by the United States. In *Odorite*, unlike the present case, the property subject to the state tax was not transferred to any further party and thus did not qualify as a sale for resale under Mo. Rev. Stat. § 144.010.1(8) (1986). See 713 S.W.2d at 837-838.

Petitioners err in contending (Pet. 23-24) that the decision in this case conflicts with the decision of the Fourth Circuit in *United States* v. *Forst*, 569 F.2d 811 (4th Cir. 1978), aff'g 442 F. Supp. 920 (W.D. Va. 1977). In *Forst*, the court held a federal contractor liable for Virginia sales tax on purchases of property that it used in performing a federal contract. Since *Forst* involved Virginia law, not Missouri law, it of course cannot be said to be in conflict with the decision in this case. Moreover, the court in *Forst* applied the Virginia tax only to items purchased by a contractor who consumed them in performing the contract and did not transfer them to the custody of the United States. 442 F.Supp. at 925. In those circumstances, the *Forst* court concluded that no resale occurred. See *ibid.* In the present case, however, a resale did occur under the criteria of Missouri law (Mo. Rev. Stat. § 144.010.1(8) (1986)) as interpreted by the Missouri Supreme Court in the *Canteen Corp.* case (Pet. App. A8). There is thus no conflict between *Forst* and the decision in this case.

5. Petitioners finally contend (Pet. 24-28) that (i) the federal common law cause of action for money had and received does not authorize the United States to recover federal funds used to pay unlawful state taxes and, (ii) even if the federal cause of action does apply in these circumstances, the United States is barred from recovery in this case because it did not comply with state administrative tax refund procedures or with the statute of limitations applicable to tax refund suits under state law. These claims are similar to tho.e presented in *United*

Finally, as the district court noted (Pet. App. A27-A29), the question whether the contractor purchased the property for resale to the United States was not considered or raised in *Thompson-Stearns-Roger*.

States v. *California*, No. 91-2003 (argued Feb. 23, 1993). The Court may therefore wish to dispose of this issue in light of its decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of this Court's decision in *United States* v. *California*, No. 91-2003. In all other respects, it should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

MICHAEL L. PAUP
Acting Assistant Attorney General

DAVID ENGLISH CARMACK
JOHN J. MCCARTHY
Attorneys

APRIL 1993